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12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

14 NATIONAL CREDIT UNION ) Case No.: CV10-01597 GW (MANx)  
15 ADMINISTRATION BOARD AS )  
16 CONSERVATOR FOR WESTERN ) **Memorandum in Support of**  
17 CORPORATE FEDERAL CREDIT ) **Defendant Todd M. Lane's**  
18 UNION ) **Motion to Dismiss Plaintiff's**  
19 ) **First Amended Complaint**  
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Plaintiff,

vs.

ROBERT A. SIRAVO, TODD M.  
LANE, ROBERT J. BURRELL,  
THOMAS E. SWEDBERG, TIMOTHY  
T. SIDLEY, ROBERT H. HARVEY, JR.,  
WILLIAM CHENEY, GORDON  
DAMES, JAMES P. JORDAN,  
TIMOTHY KRAMER, ROBIN J.  
LENTZ, JOHN M. MERLO, WARREN  
NAKAMURA, BRIAN OSBERG,  
DAVID RHAMY and SHARON  
UPDIKE,

Defendants

Date: December 20, 2010  
Time: 8:30 a.m.  
Courtroom: Los Angeles, 10

Honorable George H. Wu

1 This memorandum adopts—except Part III, Section C—the  
2 memorandum in support of Defendants’ Motion to Dismiss Plaintiff’s First  
3 Amended Complaint, filed by Defendants Burrell, Cheney, Dames, Harvey,  
4 Jordan, Kramer, Lentz, Merlo, Nakamura, Osberg, Rhamy, and Updike on  
5 November 1, 2010.

6 In addition to the arguments made in Defendants’ memorandum,  
7 Defendants Lane respectfully submits these arguments, which apply particularly  
8 to him, and follow Part III, Section A.2.d of Defendants’ memorandum.

9 **The FAC does not allege facts particular to Todd Lane.**

10 The FAC makes no specific allegations explaining how Mr. Lane  
11 breached his fiduciary duties to WesCorp—or how those breaches led to  
12 WesCorp’s alleged billion-dollar losses. The complaint states that Mr. Lane  
13 was the Chief Financial Officer of WesCorp from 1998 to April 2008, FAC ¶  
14 7, and that he and other officers proposed budgets to the Board and attended  
15 some meetings of the Asset and Liability Committee, *id.* ¶¶ 65, 74–77. That’s  
16 it. The FAC does not describe Mr. Lane’s role in, or responsibility for, any of  
17 the decisions that allegedly led to WesCorp’s conservatorship. *Id.* ¶ 114 a–h.

18 For instance, of the eight acts that the FAC claims show breach of  
19 fiduciary duties, five relate to concentration limits on investments. FAC ¶ 114  
20 c–f, h. There is not a single allegation that Mr. Lane had the responsibility for  
21 concentration limits, that he played a role in setting them, or even that he had  
22 the authority to weigh in on them. The other three alleged breaches involve  
23 strategic business decisions (and therefore are immune from liability) about  
24 WesCorp’s growth. Even if an officer could be liable for strategic business  
25 decisions, there are no allegations of Mr. Lane’s role or responsibility for them.  
26 *Id.* ¶ 114 a, b, g.

27 The FAC does mention that WesCorp had a Risk Assessment  
28 Department “responsible for adopting prudent concentration limits for its

1 investment portfolio.” FAC ¶ 68 (the FAC incorrectly refers to Risk  
2 Assessment as Risk Management). WesCorp also had an Investment  
3 Department responsible for investment returns. *Id.* ¶¶ 67, 74–76. But there  
4 are no allegations that Mr. Lane was involved with either.

5 The FAC’s First and Second Claims for Relief also don’t accuse Mr. Lane  
6 of misleading the Board for his own gain—in fact, there are no allegations that  
7 he misled the Board at all. The closest those two claims come to alleging a  
8 misrepresentation is that the executive summary of the officers’ yearly budget  
9 proposal (allegedly) contained “very little information” about WesCorp’s  
10 income from, and change in, its investment portfolio. FAC ¶ 65. The next  
11 allegation, however, likely referring to the reams of documents that backed up  
12 the summaries, says the exact opposite: that WesCorp’s budgets did, in fact,  
13 “reflect that WesCorp actively planned both to increase its borrowings to fund  
14 investments and to increase the spread required in its investment portfolio.” *Id.*  
15 ¶ 66. The officers and directors of WesCorp, according to the complaint,  
16 made informed, reasonable decisions to grow the company in order to expand  
17 its services, rather than for person gain. *Id.* ¶¶ 28, 52. Those decisions are  
18 shielded from liability that is based on nothing more than hindsight bias. *See,*  
19 *e.g., In re Citigroup Inc. S’holder Derivative Litig.*, 964 A.2d 106, 124 (Del. Ch.  
20 2009) (dismissing complaint for trying “to hold the director defendants  
21 personally liable for making (or allowing to be made) business decisions that, in  
22 hindsight, turned out poorly for the Company.”).

23 A complaint should be dismissed if it lumps together its claims of breach  
24 of fiduciary duties against an officer with the same claims against directors. To  
25 avoid dismissal, the complaint must “allege facts demonstrating (1) [the officer]  
26 took part in the challenged conduct and (2) [the officer] failed to demonstrate  
27 the due care attendant to his particular office in doing so.” *Bridgeport Holdings,*  
28 *Inc. Liquidating Trust v. Boyer*, 388 B.R. 548, 573 (Bankr. D. Del. 2008). The

1 reasoning is practical: “Different corporate offices obviously hold different  
2 responsibilities. For example, the responsibilities of [VP] of Marketing are not  
3 the same as those of a General Counsel.” *Id.* A complaint must describe what  
4 responsibilities an officer had—otherwise “it is not possible to discern what a  
5 particular defendant did or failed to do in the exercise of due care in his  
6 capacity as holder of that office.” *Id.*

7 The FAC does not describe Mr. Lane’s role within WesCorp. It doesn’t  
8 allege what he was responsible for. It doesn’t allege the decisions he made or  
9 participated in. In other words, the FAC doesn’t state a claim against Mr.  
10 Lane. *Cf. Gantler v. Stephens*, 965 A.2d 695, 709 (Del. 2009) (denying a motion  
11 to dismiss as to officers because—unlike the FAC—the complaint “sufficiently  
12 detailed acts of wrongdoing”).

13 The same is true for the Second Claim for Relief for gross negligence.  
14 To avoid dismissal, the FAC must allege a duty, then a breach of that duty, then  
15 damages proximately caused by that breach. *See Martinez v. United States*,  
16 2010 U.S. Dist. LEXIS 105763,\*20–21 (C.D. Cal. Mar. 25, 2010). The FAC  
17 does not do so, with any facts about Mr. Lane’s alleged acts or omissions.

18  
19 DATED: November 1, 2010

CHAPIN FITZGERALD SULLIVAN LLP

20  
21  
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